



# EMPLOYMENT TRIBUNALS

BETWEEN

**Claimant**

Mr Rafal Maslach

AND

**Respondent**

Princess Yachts Limited

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**HELD AT** Plymouth **ON**

1 and 2 November 2022

**EMPLOYMENT JUDGE** N J Roper

### Representation

**For the Claimant:** In person

**For the Respondent:** Mr P Howarth, Solicitor

**The Tribunal was assisted by a Polish Interpreter Ms P Clopet**

## JUDGMENT

**The unanimous judgment of the tribunal is that the claimant's claims are dismissed.**

## RESERVED REASONS

1. In this case the claimant Mr Rafal Maslach, who is Polish, claims that he has been discriminated against because of a protected characteristic, namely his race. The claim is for direct discrimination and for harassment. The respondent denies the claims.
2. The Procedural History of this Claim:
3. The claimant presented these proceedings on 22 March 2021. He alleges discriminatory treatment between 7 September 2020 and 10 November 2020. He had commenced the Early Conciliation process with ACAS on 11 March 2021 (Day A), and ACAS issued the Early Conciliation Certificate on the same day, 11 March 2021, (Day B). There was a case management preliminary hearing on 1 November 2021 and Employment Judge Gray made case management orders on that day ("the First Order"). This included listing a preliminary hearing to consider the respondent's assertion that the claims had been presented out of time. On 10 March 2022 Employment Judge Oliver determined that the claimant's claims had potentially been presented out of time, but she determined that it was just and equitable

- to extend time so that the claims were permitted to proceed. She also made further case management orders on that day (“the Second Order”).
4. The claimant relies on his Polish nationality for the purposes of these claims, and his claims of direct race discrimination and harassment related to race were set out in a list of issues in the First Order, and it was confirmed in the Second Order that the claims to be determined at this hearing were limited to those issues. These are set out further below.
  5. On 28 October 2022 both parties gave their written consent for this matter to be determined by an Employment Judge sitting alone pursuant to section 4(3)(e) of the Employment Tribunals Act 1996.
  6. This Hearing:
  7. I have heard from the claimant, and from Mr Krzysztof Arciszewski on his behalf. For the respondent I have heard from Mrs Lorraine Plews, Mr Bradley Nott and Mr Wayne Chinnock. The claimant accepted and did not challenge the evidence of Mrs Plews and Mr Nott, and accepted Mr Chinnock’s evidence save for one question.
  8. There was a degree of conflict on the evidence. I have heard the witnesses give their evidence and have observed their demeanour in the witness box. I found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
  9. The Facts:
  10. The respondent is a luxury yacht manufacturer which operates primarily from various sites around Plymouth in Devon.
  11. The claimant Mr Rafal Maslach is Polish. He commenced employment with the respondent on 24 February 2020, and his role was as a Laminator. He originally worked on the N7 production line and his line manager was Mr Scott Haywood (Laminator Section Lead). With effect from 30 November 2020 the claimant worked solely on the respondent’s G1 production line reporting to Mr Wayne Chinnock (one of the respondent’s Production Managers) from whom I have heard.
  12. The claimant was signed off work because of sickness on 8 February 2021. Mrs Lorraine Plews, from whom I have heard, is an HR Business Partner for the respondent. She referred the claimant to the respondent’s Occupational Health Department who reported that the claimant alleged he was suffering from symptoms of work-related stress because of “ongoing bullying by his manager” and “racist remarks”. This was the first occasion upon which the claimant had raised any such issues. Mrs Plews notified Mr Chinnock who had not been made aware of the issues now raised by the claimant. Mrs Plews invited the claimant to attend an informal meeting with her and Mr Chinnock on 2 March 2021.
  13. The claimant failed to attend that informal meeting which was rearranged to 15 March 2021. The claimant attended with a companion who is also Polish and who acted as his interpreter. The claimant explained that he had worked on the N7 production line but after being shouted out was moved to a different production line by his manager, but that he was still being “picked on” by his colleagues. The claimant initially stated that Mr Capon (a Production Manager) was the manager whose behaviour he found to be unacceptable, but subsequently admitted that it was not Mr Capon. The claimant indicated that one of his colleagues Mr Krzysztof Arciszewski had reported that the claimant was being bullied, which had resulted in his being moved. The claimant conceded that he had not spoken to Mr Chinnock about the matter following his move to the G1 line. When pressed the claimant asserted that on the N7 production line his colleagues had told him that he was too slow and getting things wrong and that racist remarks were made to him, specifically that he should “go back to Poland” and that he should “take his wazzer and fuck off back to Poland”. The claimant asserted that it was Mr Scott Haywood, the Section Lead Laminator, who had said these things and who had also shouted at him.
  14. Mrs Plews decided to investigate in more detail, and she decided to treat the claimant’s allegations as a Stage 1 Grievance. She arranged preliminary investigation meetings between Mr Chinnock and some members of the N7 production line team, namely Scott Haywood, Daniel Warren, Will Harper, Justin Coombes, and Krzysztof Arciszewski. During the course of these proceedings the claimant has asserted that Daniel Warren also racially

- abused him on the N7 production line, but this did not form part of the allegations which the claimant explained to Mrs Plews at that time.
15. At his meeting Mr Scott Haywood explained that the claimant's workmates often referred to each other (including the claimant) as "shag". This was an offensive term in Polish and the claimant objected to it. The claimant had raised this with Mr Coombes, the Production Lead, who then instructed the various employees to stop using that term. The claimant was satisfied with the way in which that matter had been resolved. Mr Haywood categorically denied making any of the alleged racist comments. He described his working relationship with the claimant as "OK" but reported that the claimant struggled to complete his duties satisfactorily. He accepted that he had shouted at the claimant on one occasion when the claimant had walked across a boat when the gel was still wet. Mr Haywood confirmed that he had no issues with other Polish colleagues or those of other nationalities.
  16. Mr Hayward's version was consistent with the versions given by other members of the N7 team. It became clear that Mr Haywood took his management responsibilities seriously with regard to the progression of the production line and would shout at or call out people if he thought they were "slacking". He seemed frustrated with the claimant's performance generally because he would not start work until he was told and seem to lack initiative. There was no indication from any of the other members of the team that Mr Hayward had ever targeted or abused the claimant because of his Polish nationality.
  17. The claimant's Polish colleague Mr Krzysztof Arciszewski was interviewed. He reported that the claimant had been told to work faster and that this was said to him "really loudly". He confirmed he had not witnessed any swearing directly at the claimant and nor could he remember any evidence of any racist abuse, but only stated the claimant was being pushed to work faster.
  18. Following this review Mrs Plews and Mr Chinnock agreed that there was no evidence of discrimination against the claimant and that any comments which had been made to him to which he had objected did not warrant any further action. This included for example having been called "shag", which issue had been resolved. Mrs Plews spoke to the claimant with her conclusions on 30 March 2021, and the claimant remained on certified sickness absence for "mixed anxiety and depression". Mrs Plews arranged for a further Occupational Health appointment and the claimant remained signed off work for a further month to 5 June 2021 for "anxiety and low mood".
  19. On 13 May 2021 the claimant then submitted a formal written grievance. He stated that he was content in his job until November 2020 but after this he was discriminated against by way of degrading and racist comments, with the result that he was signed off with stress, anxiety and depression. At that stage the claimant also issued these Tribunal proceedings which he presented on 10 May 2021.
  20. The claimant's grievance letter was treated as a Stage 2 Grievance, and Mr Bradley Nott, the respondent's Senior Production Manager from whom I have heard, was appointed as the investigation manager. Mrs Plews had received confirmation that the claimant was well enough to attend workplace meetings and had arranged another grievance meeting for 8 June 2021. The claimant failed to attend. Mrs Plews offered him the opportunity to provide an alternative date and time or otherwise to hold the meeting virtually, but the claimant did not respond.
  21. The claimant resigned his employment on 25 August 2021. In his resignation letter he thanked the respondent for the opportunities which had been provided to him, and there was no reference in his resignation letter to any further allegations or disputes. Notwithstanding the claimant's departure, the respondent decided to continue with the grievance investigation.
  22. In his role as the Investigating Manager Mr Nott held investigative meetings with 24 different employees. On 14 July 2021 this included Mr Lukasz Dabrowski, a former colleague of the claimant, whom the claimant had suggested had witnessed incidents of bullying and racist comments. Mr Dabrowski confirmed that he had seen that Justin Coombes had treated the claimant badly over a year before, but that he had not witnessed any racist comments and had not witnessed anything between Mr Haywood and the claimant or other colleagues.

23. Mr Nott concluded that none of the employees whom he had interviewed had witnessed any incident of harassment, bullying, victimisation or racist abuse. There were frequent references to banter which was prolific on the shop floor but no reports of name-calling or racist or hateful comments. Strong language and swearing was commonplace on the shop floor but this had not been directed at the claimant or other specific individuals, and it was in no way malicious. It was the case that the claimant had previously been called "shag", as were other employees, but when they were told that this was an offensive term in Poland the employees stopped using that word.
24. Mr Nott also concluded that Mr Haywood was respected for his hard work ethic but that he had a direct and potentially abrasive management style if employees failed to meet the high standards of workmanship which he expected. Mr Haywood admitted that he had said words to the effect "what the fuck are you doing" to the claimant when he walked over a freshly gelled boat.
25. Mr Nott also considered the claimant's performance reviews during his probationary period. These show that the claimant was struggling with basic skills and although he worked well with some individuals he did not do so with others, and he was not listening to what he was told. Even though he was moved to a different production line his performance was still not up to standard and earlier on 3 February 2021 this had resulted in an extension to his probationary period.
26. Mr Nott produced his investigation report on 22 September 2021 and concluded that there had been no racial abuse, harassment or bullying of the claimant because none of the accounts of the many employees interviewed corroborated the claimant's claims. None of the other employees were able to confirm that an incident had occurred with the claimant being laughed at or receiving racial or other abuse. Mr Nott concluded there were no findings to substantiate the alleged racist comments by Mr Haywood, and that the findings did not support the allegations of inappropriate behaviour by Mr Haywood in shouting at the claimant. In addition, there was no evidence to support the allegation that Mr Warren had behaved inappropriately towards the claimant. Mr Nott concluded that Mr Haywood had some communication developmental needs which he recommended should be addressed through training.
27. Mr Nott confirmed his findings to the claimant in a detailed three-page letter dated 22 September 2021. Mr Nott rejected the claimant's grievance. The claimant was afforded the right of appeal against that finding, but the claimant did not appeal.
28. Against the above background I make the following findings of fact in connection with the three specific allegations raised by the claimant which by consent consisted of the agreed list of issues to be determined at this hearing.
29. Before doing so I record that I have borne in mind the following submissions made by Mr Howarth on behalf of the respondent: (i) the claimant has been unable to provide any dates as to when the alleged incidents supposedly occurred; (ii) the claimant made no complaint about the relevant issues at the time he says that they arose, nor immediately afterwards. On the claimant's case this must have been before 10 November 2020 but no complaint was made to the respondent for at least three months until the Occupational Health report on 22 February 2021; (iii) the claimant has been unable to provide any witnesses to support his allegations; (iv) the alleged event involving Danny Warren was not raised at any time during either of the respondent's investigations (March 2021 and then May 2021) and no reference to it is included in the claimant's witness statement for today's hearing; (v) the claimant took no part in the formal grievance process which he commenced and supplied no details beyond his original grievance letter which gives no evidence and no details of the three allegations which he now relies upon; (vi) the respondent is a responsible employer which undertook two separate and detailed investigations, both of which contradicted the claimant's account; and (vii) except for one question to Mr Chinnock about the incident when Mr Haywood accepts that he shouted at the claimant for walking across a freshly gelled boat, the claimant did not challenge any of the respondent's witnesses and effectively accepted the evidence set out in their statements. I agree with the content and effect of those submissions. In addition, it is clear from the contemporaneous performance review documents, and it was accepted by the claimant in cross examination, that the

- respondent had ongoing issues with both the quality and speed of his work. This was the context in which the claimant appears to have objected to Mr Haywood's management.
30. The claimant relies on three allegations, all said to have taken place between 7 September 2020 and 10 November 2020 while he was working on the N7 boat.
  31. The first allegation is that Mr Scott Haywood of the respondent shouted at him almost every day in that time period. The second allegation is that this included Mr Haywood saying to the claimant that "if he didn't like the job he should return to Poland".
  32. It seems clear to me from the contemporaneous evidence, and I so find, that Mr Haywood was responsible for managing a production line which required accurate and timely contributions from the various employees. He was not prepared to accept work which was not done to his exacting standards, nor any work which was not done in good time. He appears to have had something of an abrasive management style, and he was known to shout at employees. This included shouting and swearing at the claimant when he was exasperated to see the claimant walk across a new boat with fresh gel before the gel had dried. Additional context is that the production line was in a very large building with machinery being used, and it was often necessary to shout to be heard. One of the results of the respondent's investigation was that Mr Haywood was invited to undertake training to improve his management style.
  33. However, there is no evidence that Mr Haywood ever used racist language, and no suggestion or evidence that Mr Haywood treated the claimant, other Polish employees, or other nationalities any differently from the way in which he treated English employees. A large number of employees were interviewed during the investigation and the conclusion was that Mr Haywood treated everyone in the same way in that he expected people to work hard and do the job properly.
  34. Against this background I accept the claimant's first allegation in part. I accept that Mr Haywood did shout at the claimant. However, I cannot find that Mr Haywood did so "almost every day" as alleged. In addition, this was in the context of all employees being treated in the same way, and without any loud or aggressive language being in any way related to the claimant's Polish nationality.
  35. As for the second allegation, Mr Haywood denies that he ever said to the claimant that if he "didn't like the job he should return to Poland". There is no evidence to support this allegation, and bearing in mind the context set out above, I dismiss this allegation and I find that it did not occur.
  36. The third allegation is that Danny Warren referred to the claimant "as being useless on the N7 boat". This was not raised at any time by the claimant during either of the investigations in March and May 2021 which followed his complaints at those times. He made no mention of this allegation in his witness statement to this tribunal. The evidence of the respondent's witnesses, which the claimant did not challenge, was that despite their extensive investigations no finding was ever made that Mr Warren had behaved inappropriately towards the claimant. There is no evidence before this tribunal, nor in the contemporaneous documents, that Mr Warren acted in this way. For these reasons I dismiss this allegation and I find that it did not occur.
  37. Having established the above facts, I now apply the law.
  38. The Law:
  39. This is a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination and harassment.
  40. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.
  41. As for the claim for direct discrimination, under section 13(1) of the EqA a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
  42. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.

43. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
44. I have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as “s. 207A(2)”) and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 (“the ACAS Code”).
45. I have considered the cases of: Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Nagarajan v London Regional Transport [2000] 1 AC 501; Hewage v Grampian Health Board [2012] IRLR 870 SC; Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564 Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13; Ahmed v the Cardinal Hume Academies EAT 0196/18; Grant v HM Land Registry [2011] EWCA Civ 769; and Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT. I take these cases as guidance, and not in substitution for the provisions of the relevant statutes.
46. Decision - Direct Discrimination s13 EqA:
47. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant.
48. In Madarassy v Nomura International Plc Mummery LJ stated: “The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an act of discrimination”. The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.
49. The three allegations relied upon by the claimant as acts of direct discrimination on the grounds of his Polish nationality are set out above.
50. With regard to the first allegation, I have found that Mr Haywood did shout at the claimant from time to time during the period relied upon, but that this was consistent with Mr Haywood’s treatment of other employees and was not on the grounds of or related to the claimant’s Polish nationality. The claimant relies on a hypothetical comparator, and this requires considering a hypothetical fellow employee in the same position as the claimant, namely someone whom Mr Haywood felt to have been underperforming and/or who chose to walk across a freshly gelled boat when he should not have done. It is simply not the case that the claimant was treated any differently from the way in which his hypothetical comparator of a different race or nationality was or would have been treated.
51. As for the second allegation, for the reasons set out above I have already dismissed the allegation that Mr Haywood said to the claimant that if he “didn’t like the job he should return to Poland”. I have already found that this did not occur.
52. As for the third allegation, for the reasons set out above I have already dismissed the allegation that Danny Warren referred to the claimant “as being useless on the N7 boat”. I have already found that this did not occur.
53. In this case, I find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of

discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails, and it is hereby dismissed.

54. Decision – Harassment s26 EqA:
55. The claimant repeats the same three allegations as being harassment related to his race to the extent that they have not been found to have been acts of direct discrimination.
56. With regard to the first allegation, I have found that Mr Haywood did shout at the claimant from time to time during the period relied upon.
57. As for the second allegation, for the reasons set out above I have already dismissed the allegation that Mr Haywood said to the claimant that if he “didn't like the job he should return to Poland”. I have already found that this did not occur.
58. As for the third allegation, for the reasons set out above I have already dismissed the allegation that Danny Warren referred to the claimant “as being useless on the N7 boat”. I have already found that this did not occur.
59. The remaining question therefore is the extent to which Mr Haywood's shouting at the claimant from time to time during the period relied upon can be said to amount to harassment which is related to the claimant's Polish nationality.
60. The statutory definition of harassment is as follows: A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
61. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).
62. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: “In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.
63. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 “Tribunal's must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.” Similarly, Langstaff P emphasised in Betsi at para 12: “The word “violating” is a strong word. Offending against dignity, hurting it, is insufficient. “Violating” may be a word the strength of which is sometimes overlooked. The same might be said of the words “intimidating” etc ...”
64. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: “one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more

precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.”

65. I have found that Mr Haywood did shout at the claimant from time to time during the period relied upon. On balance I find that this was unwanted conduct, and I also find that the claimant’s perception was that at least on occasions this created an intimidating or hostile working environment. However, Mr Haywood’s abrasive manner on occasions towards the claimant was consistent with his treatment of other employees and was not related to the claimant’s Polish nationality. It should be seen in the context of a loud and busy working environment; the requirement to keep the production line moving; the claimant’s recorded performance deficiencies; and Mr Haywood’s responsibilities to ensure that the respondent’s workforce were committed and efficient. It is clear from the claimant’s contemporaneous performance and appraisal records, and his other actions such as walking across a freshly gelled boat, that he fell short of the levels of efficiency and expertise expected of him. Any such shouting and comments made by Mr Haywood to the claimant must be seen in this context, and it cannot be said to be related to the claimant’s Polish nationality.
66. For these reasons I also dismiss the claimant’s claim of harassment related to race.
67. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 9 to 36; a concise identification of the relevant law is at paragraphs 38 to 45; how that law has been applied to those findings in order to decide the issues is at paragraphs 46 to 66.

Employment Judge N J Roper

Date: 3 November 2022

Judgment sent to Parties: 11 November 2022

FOR THE TRIBUNAL OFFICE